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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 676

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of the State of California

Motion to Dismiss or Affirm

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Dated: November 12, 1965

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On Appeal From the Supreme Court of the State of California

Motion to Dismiss or Affirm

Appellee, the Public Utilities Commission of the State of California, moves to dismiss or affirm on the grounds that the question presented is so unsubstantial as not to need further argument.

STATEMENT

The Northwestern Pacific Railroad Company (hereinafter referred to as NWP) is a railroad corporation, a common carrier, and a public utility as those terms are defined in the Constitution of the State of California and in the Public Utilities Act of California, and as such is subject to the regulatory jurisdiction of the California Public Utilities Commission. On July 20, 1961, NWP's Puerto Suello

tunnel was heavily damaged by fire. Cave-ins closed the tunnel portals and thus cut NWP's main line at a point just north of San Rafael, California.[1] Instead of taking immediate steps to repair the tunnel and restore service, NWP filed an application with the Interstate Commerce Commission (hereinafter referred to as ICC) asking for a certificate of public convenience and necessity permitting abandonment (Section 1(18) of the Interstate Commerce Act) of a two and one-half mile segment of line, on a part of which the tunnel is located. After ten days of hearing in 1962 before the ICC in Finance Docket No. 21725, extensive briefs, a recommended report and order by the hearing examiner recommending denial of authority to abandon, exceptions to the recommended report and replies thereto, and oral argument before the ICC in 1963, the ICC issued its decision (320 ICC 19 (1963)) accepting the recommendations of the hearing examiner and denying the certificate authorizing abandoment.

After exhausting administrative remedies before the ICC the NWP appealed the decision to a three-judge federal district court in San Francisco in July, 1963, where the matter was extensively briefed and argued. The district court dismissed the appeal and affirmed the order of the ICC. (*Northwestern Pacific R.R. Co. v. United States,* 228 F. Supp. 690 (1964)). One month later, May 19, 1964, the NWP had still made no move to rebuild the tunnel and reopen their main line to traffic. Since the ICC decision only denied the application for authority to abandon and did not affirmatively order reconstruction of the tunnel, the California Commission issued an order instituting investigation in Case No. 7907, and hearing thereon was had in June,

1. See map attached as Appendix A. The Puerto Suello tunnel is identified thereon as Tunnel No. 4.

1964. On August 10, 1964, the NWP filed its second application with the ICC, again seeking authority to abandon the tunnel (F.D. 23249). Three days later, August 13, 1964, NWP filed an appeal with the United States Supreme Court seeking review of the judgment of the three-judge district court affirming the decision of the ICC in Finance Docket No. 21725. (*Northwestern Pacific Railroad Co. v. Interstate Commerce Commission, et al.*, October Term, 1964, No. 381.) Motions to affirm were filed by the United States, the ICC, the California Commission, the Atchison, Topeka and Santa Fe Ry. Co. (hereinafter referred to as Santa Fe), and by counsel representing the County of Marin and several cities and shippers in said County (hereinafter collectively referred to as the Marin County parties).

During the pendency of the appeal to the United States Supreme Court of the ICC decision in Finance Docket No. 21725, the California Commission issued Decision No. 67889 in Case No. 7907 on September 22, 1965. That decision by the California Commission, affirmatively ordering reconstruction of the tunnel, is the subject of the instant appeal and is attached to the Jurisdictional Statement as Appendix C. On November 23, 1964, the United States Supreme Court affirmed the judgment of the three-judge district court and the ICC decision in Finance Docket No. 21725. (*Northwestern Pacific R.R. Co. v. ICC,* 379 U.S. 132; 13 L. ed. 2d 333). On January 18, 1965, the Supreme Court of the United States denied rehearing.

After the filing by NWP on August 10, 1964, of its second attempt to secure ICC approval of the tunnel abandonment (F.D. 23249), the California Commission, Santa Fe and the Marin County parties moved the ICC to dismiss the second application on the grounds that the issues relative to the tunnel had already been recently adjudicated in Finance Docket No. 21725, which matter was still then on appeal.

The motions to dismiss were denied by the assigned ICC commissioner on December 10, 1964. On February 1, 1965, the California Commission, the Santa Fe and the Marin County parties petitioned the ICC for reconsideration of the order denying motions to dismiss. On March 24, 1965, Division 3 of the ICC, acting as an Appellate Division, issued its order (attached hereto as Appendix B) vacating and setting aside the order of December 10, 1964 and dismissing the new application in Finance Docket No. 23249. The NWP thereupon, on April 28, 1965, petitioned for rehearing of the order of dismissal of March 24, 1965. On July 29, 1965, Division 3 of the ICC vacated and set aside the order of dismissal of March 24, 1965, and directed that Finance Docket No. 23249 be set for hearing. Thereafter, in August, 1965, the California Commission, the Santa Fe and the Marin County parties filed extraordinary petitions for relief under Rule 1.102 of the ICC's General Rules of Practice asking that the ICC review its order of July 29, 1965 which reinstated Finance Docket No. 23249 for hearing. The scheduled hearings of Finance Docket No. 23249, originally set for February 1, 1965 were continued to October 18, 1965, as set forth at page 7 of the Jurisdictional Statement. However, by telegram dated October 14, 1965, the ICC advised that the hearings were "postponed indefinitely pending further order of the Commission". The present state of Finance Docket No. 23249, then, is that the aforesaid extraordinary petitions for relief are still under consideration by the ICC and the hearings are postponed indefinitely.

Meanwhile, in Decision No. 67889 of the California Commission, NWP filed a petition for writ of review with the Supreme Court of California (S.F. No. 21861). That petition and a subsequent petition for rehearing were denied. (Appendices A and B to Jurisdictional Statement). On

September 13, 1965, NWP filed with the Supreme Court of California a Petition for Writ of Mandate (S.F. No. 22132) requesting the Supreme Court of California to direct the California Commission to certify to the United States Supreme Court portions of the record made before the California Commission in Case No. 7907 which had not been placed before the Supreme Court of California by NWP when it filed its petition for writ of review of the California Commission's Decision No. 67889. The Petition for Writ of Mandate was denied on September 13, 1965. The Petition for Rehearing thereof, described as still pending at pages 19 and 23 of the Jurisdictional Statement, was denied by the Supreme Court of California on October 13, 1965.

ARGUMENT

Certain unusual aspects of NWP's attempts to abandon the Puerto Suello tunnel should be brought to this Court's attention. They will serve to explain the long and tortuous history of the proceeding, before the ICC, the California Commission and the courts, as set forth above. The NWP is a wholly-owned subsidiary of the Southern Pacific Company (hereinafter referred to as SP). As will be observed from the attached map, Appendix A, the NWP connects with the SP at Schellville, California, on one route and in the alternative at Tiburon, California, with SP's arch rival, the Santa Fe. Upon collapse of the tunnel, traffic formerly routed by shippers over the NWP via the Tiburon route and thence over the Santa Fe lines to the south and east, had to move of necessity via Schellville and over the SP.

At the ICC hearings in Finance Docket No. 21725, NWP's own evidence clearly showed that NWP would be much better off financially if it rebuilt the tunnel, reopened its main line, and resumed the prior service than if it were successful in keeping the tunnel closed. This fact was made

clear by the ICC in its decision in Finance Docket No. 21725 and at no time has it been disputed by NWP. The reason for the apparent self-defeating proposal to abandon made by NWP is that the move is dictated by the best interests of NWP's parent, the SP. NWP's own evidence in Finance Docket No. 21725 showed that SP would gain more revenue as a result of traffic diverted from the rival Santa Fe to the SP than SP's subsidiary would lose because of the tunnel closing. Thus the tunnel fire, rather than being a disaster, was an unexpected stroke of good fortune for the SP. The traffic diversions which have continued now for more than four years put time and delay on the side of the SP and explain why it is utilizing every possible tactic in the administrative and judicial processes to keep the tunnel closed and continue the windfall.

In the usual abandonment proposal the service remains in operation during the ICC proceedings and any judicial action thereafter. The public continues to enjoy the use and availability of the service until the controversy is finally decided. Here, because of an unfortunate act of arson by juveniles, a *de facto* abandonment occurred in the beginning and while the SP profits from traffic diversions the public has been and is denied service through the tunnel. The California Commission feels strongly that these circumstances explain the long succession of appeals and delays by NWP in an abandonment proposal which, on its face, was totally devoid of merit. Section 1(18) of the Interstate Commerce Act established as the only test in authorizing abandonments "the present or future public convenience and necessity." In *Colorado v. United States,* 271 U.S. 153, 70 L. ed. 878 (1925), it was made clear that the objective of the section was the protection of interstate commerce from undue burdens and not the enhancement of profits of one railroad at the expense of a competing line.

When it appeared that the possibilities for delay in appeals from Finance Docket No. 21725 were nearing an end, the NWP thereupon attempted to start the whole cycle anew by filing again with the ICC in Finance Docket No. 23249 on the basis of a claimed change in conditions. We are confident that the ICC, which in its last act herein on October 14, 1965, cancelled the October 18th hearing and postponed the new application "indefinitely" will not permit the NWP to continue its dilatory tactics.

The California Commission Acted Lawfully in Ordering Reconstruction of the Tunnel

At the hearing of Case No. 7907 the California Commission proceeded under Section 762 of the California Public Utilities Code, as follows:

> "Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has

> been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured."

The significant language for our purposes here is "to promote the security or convenience of . . . . the public, or in any other way to secure adequate service or facilities . . . ." It was obvious that a determination under such statutory language would be nothing more than a reconsideration of the same issues determined by the ICC in Finance Docket No. 21725. The California Commission agrees with NWP's statement that the ICC has exclusive jurisdiction over abandonments. In finding that the present and future public convenience and necessity were not shown to permit abandonment, the ICC necessarily found that the tunnel was needed for the "convenience of the public" and "to secure adequate service". The California Commission did not have the power to decide the issue of public convenience under Section 762 in a manner inconsistent with the finding of the ICC on present and future public convenience and necessity under Section 1(18) of the Interstate Commerce Act.

At the hearing, the ICC examiner's recommended report and order, the decision of the ICC in Finance Docket No. 21725 and the decision of the three-judge court affirming the ICC were officially noted and received in evidence. When counsel for NWP attempted to introduce evidence and testimony intended to establish that there was no public need for the tunnel, the presiding commissioner would not permit such attempt, stating that the California Commission had no intention of retrying issues already decided by the ICC. In its Decision No. 67889 the California Commission set forth and accepted the prior determination of

the ICC on the issue of public convenience and added that it will act only to *supplement* what the ICC has done by affirmatively ordering repair of a tunnel for which the ICC has declared there is a public need. In so ordering the California Commission has authority under Section 762 and the Union Station cases set forth in Decision No. 67889. All the evidence that was necessary to support an order requiring repair of facilities under Section 762, was (1) a showing that certain facilities or structures were in a state of disrepair and (2) that said facilities or structures were needed for the convenience of the public. The first requisite was met by testimony of a California Commission engineer. As to the second, the California Commission accepted the finding of the ICC, not on the theory of *res judicata* as claimed at page 18 of the Jurisdictional Statement, but rather, in recognition of the rule of federal supremacy.

The effect and significance of the Union Station cases (*Interstate Commerce Commission v. United States,* 280 U.S. 52, 62; 74 L. ed. 163 (1929); *Atchison T. & S.F. Ry. Co. v. Railroad Commission,* 283 U.S. 380; 75 L. ed. 1128 (1931); see also *Atchison, Topeka and Santa Fe Ry. Co. v. Railroad Commission,* 209 Cal. 460 (1930)) is set forth in detail in Decision No. 67889. Briefly, they establish limitations to the ICC's abandonment jurisdiction in holding that the ICC cannot affirmatively order construction coincident therewith, while at the same time defining limitations to the powers of the California Commission to prevent encroachment upon the abandonment jurisdiction of the ICC. The net effect insofar as the instant proceeding is concerned is that the ICC's jurisdiction with respect to abandonment may be supplemented by the jurisdiction of the California Commission to require construction and repair of facilities and structures. The acts of the ICC and the California

Commission were complementary, valid, and the only way in which the public interest could be served in the unusual circumstances of this proceeding.

The Order Requiring Restoration of the Service Existing Prior to the Fire Is Lawful

At pages 14 and 15 the Jurisdictional Statement complains of that portion of the order in Decision No. 67889 which requires NWP, upon repair of the tunnel, to restore the same level of service which existed prior to the fire. The objections are based upon Section 761 of the California Public Utilities Code.[2]

It is submitted that Section 761 requires a hearing in those situations where the California Commission would require a level of service different from that which had theretofore existed. In its decision the California Commission ordered no change. It required only a restoration of the exact quantity and quality of service which had existed prior to the fire. With the tunnel closed for several years it is difficult to see how any determination of a level of service different from that which pre-existed could be arrived at without resort to speculation and conjecture. If a change in the level of service is justified, it can only await repair of the tunnel and restoration of service in order that the

2. "761. Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules."

volume of traffic can be ascertained under then current conditions. If a change then appears warranted, it can be accomplished under the usual procedures. In view of NWP's history of delay and its clear motives of continuing on behalf of its parent SP, at all cost to NWP, the existing diversion of traffic from Santa Fe, it could be expected that if the decision had made no order with respect to restoring train service, the NWP would rebuild the tunnel but operate no trains over the route. This would necessitate, to NWP's satisfaction, another formal proceeding before the California Commission, another decision, and with successive appeals therefrom terminating eventually again with this Court, additional years of delay and continued windfall to SP at the expense of the Santa Fe, not to mention inconvenience to the shipping public, would result.

The issue in this proceeding is whether or not the tunnel should be repaired. The matter of service had been injected as a diversionary tactic. Even if the Court should see merit in the service issue, the portion of the order requiring repair of the tunnel should be sustained.

NWP's Argument That the Supreme Court of California and the California Commission Must Review Evidence of the Flood Damage Is Not Only Erroneous but Inconsistent

NWP argues (Jurisdictional Statement, pp. 13-14) that evidence of the flood damage sustained in the winter of 1964-1965, after the hearing in Case No. 7907 and issuance of Decision No. 67889, should be considered by both the Supreme Court of California and by the California Commission. The theory apparently is that if this were done, the Supreme Court of California and this Commission would conclude that in the circumstances public convenience and necessity require that the tunnel abandonment be allowed. The defect in this argument is, of course, obvious.

As NWP itself states, only the ICC has jurisdiction to weigh the evidence and resolve the issue of whether public convenience and necessity permit the abandonment.

The NWP is most deceptive in complaining of the flood loss, its adverse effect on NWP's net profits, and urging this as evidence justifying abandonment. NWP neglects to mention that its own evidence in Finance Docket No. 21725 showed that NWP itself would be better off financially to a most substantial degree if the tunnel were rebuilt and the main line restored to operation. The core of this entire dispute is that NWP's parent, the SP, as a result of the tunnel closing, gains more by diversions from Santa Fe than the NWP loses. This was so found by both the recommended report and order of the hearing examiner and by the ICC decision in Finance Docket No. 21725 (320 ICC 19). At page 20 the decision adopted as its own the findings and conclusions of the examiner. The result is that abandonment of the tunnel could not in any respect assist or improve NWP's claimed "sub-marginal net profit." The truth is the opposite—reconstruction of the tunnel would *improve* NWP's profits. Collaterally, of course, it would affect SP's profits adversely since the diversions from Santa Fe would cease. But SP has never been a party in any of these proceedings. Its profits have never been in issue and could not even remotely justify a finding that public convenience and necessity permit abandonment of a portion of NWP's line.

The Abandoment Sections of the Interstate Commerce Act Do Not Deprive the California Commission of Its Jurisdiction to Order Repair of NWP's Facilities

It is stated repeatedly throughout the Jurisdictional Statement that under Section 1(20) of the Interstate Commerce Act the federal district courts have "exclusive" jurisdiction to enjoin any act contrary to Sections 1(18) (19)

and (20). We would point out first that district courts are not specifically named in Section 1(20), but that reference is made to "any court of competent jurisdiction." We agree, of course, that a federal district court qualifies as a court of competent jurisdiction, but there is nothing, either in the statute or the cases cited by NWP, to support any inference that the district court's jurisdiction in this respect is exclusive.

A reading of Sections 1(18) (19) and (20) reveals without doubt that what was contemplated in Section 1(20) was *affirmative* action by a railroad to effect an abandonment without first having secured certificate authority from the ICC. Such affirmative action in violation of the statutes may be enjoined as provided. In the instant proceeding NWP undertook no affirmative action to effect an abandonment which could be enjoined. NWP's sin is one of omission in that it failed to take affirmative action to overcome an unauthorized *de facto* abandonment created by acts of other parties. In these circumstances it is questionable whether Section 1(20) gives jurisdiction even to a federal district court to grant injunctive relief which is mandatory rather than merely prohibitive. Substantial authority has established that there is no "abandonment" within the meaning of the Interstate Commerce Act where cessation of operations results not from volition of the railroad, but from conditions over which the railroad had no control.

In two recent cases in which injunctive relief was sought in federal district courts under the provisions of Section 1(20), such relief was denied on that basis. In *Myers v. Arkansas & Ozarks Ry. Corp.*, 185 F.Supp. 36, 41 (1960) it was so held when heavy rains and floods damaged portions of a line and certain bridges. In *McGrody v. Baltimore and Ohio Railroad Co.*, 217 F.Supp. 252 (1963) the

railroad halted operation of a river tugboat and carfloat service when the last two shippers utilizing the service moved to other locations and there were no further calls for such service. Plaintiffs were a labor union concerned with lost jobs, seeking an injunction under Section 1(20). That court also strictly construed the abandonment sections and found there was no "abandonment", but merely a cessation of operations where there was no demand for the service and where the railroad's tariff was still in effect, and the railroad held itself out to the public as ready to perform the service if there was any demand. In this regard, see also: *Smith v. United States,* 211 F.Supp. 66 (1962) at page 69; and *Zirn v. Hanover Bank,* 215 F.2d 63 (1954) at page 69.

It is evident from the above cases that injunctive relief under Section 1(20) is strictly construed by the federal courts, probably in part under the general view prevailing that such relief is summary, peculiar and extraordinary in nature and should not be granted in doubtful cases, but only where the right thereto is clear. Since there was no voluntary act of abandonment by NWP here, but rather a condition resulting from the acts of third persons over whom the NWP had no control, and because NWP still maintains its tariffs on file with this Commission for service through the tunnel and can claim only a temporary cessation of operations, it is submitted that any attempt to secure affirmative injunctive relief in a district court requiring NWP to expend some $850,000[3] to reconstruct a

3. The ICC found that the cost of reconstruction would be $851,655, but the decision in Finance Docket No. 21725 notes that NWP collected $200,720 in insurance on a $500,000 deductible policy. The actual out-of-pocket cost to NWP would be further reduced by certain income tax savings, i.e. deduction resulting from casualty loss not compensated by insurance.

tunnel would meet with failure. It is the opinion of the California Commission that the only relief available to the long-suffering shipping public of California is that provided for in Decision No. 67889, as authorized by Section 762.

The Record

NWP asks that the California Commission be required by this Court to certify for transmission to the Court the record made before the Commission in Case No. 7907. California statutes provide for review of decisions of the California Commission by the Supreme Court of California by way of petition for writ of certiorari or review. (See statutes set forth at page 20 of Jurisdictional Statement). If the writ issues the Commission is *then* directed to certify its record in the case to the Supreme Court of California. Since the California Court declined to issue the writ, the only portions of the record before that court are whatever NWP deemed important enough to append to its petition for writ of review.

It is the position of the California Commission that the record on review to the Supreme Court of the United States should be no more than was before the Supreme Court of California. NWP has not cited to this Commission any convincing authority to support its view. In the Jurisdictional Statement NWP refers to the requirements of the Revised Rules of the Supreme Court of the United States, but no specific rule is identified. The cited case of *Re Summers,* 325 U.S. 561, 563 (1945), is not in point. It involves a petition for a writ of certiorari to review the action of the Supreme Court of Illinois in denying petitioner's prayer for admission to practice law in Illinois. It appears that the record in question there was made in the Supreme Court of Illinois. There was no original forum below, court or administrative agency, and no petition for writ of review

procedure to the state supreme court. The record brought up to this Court was that which was before the Supreme Court of Illinois. This, in essence, is what we urge should result in the instant proceeding.

The petition for writ of mandate referred to at page 19 of the Jurisdictional Statement has been denied by the California Supreme Court. The petition for rehearing thereof, described as still pending, was denied October 13, 1965. Again, in seeking to bring before this Court the entire record made before the California Commission in one-half day of hearing, NWP is prompted only by motives of creating delay and diversion. Nowhere does it attempt to state what is in the record that could assist NWP in this Court. The record consists in part of transcript in which counsel for NWP is primarily engaged in an unsuccessful attempt to retry before the California Commission the issue of the need for the tunnel, which issue had already been decided by the ICC in Finance Docket No. 21725 and which the California Commission has no jurisdiction to pass upon. Of the exhibits, most were introduced for identification by NWP but not received in evidence by the Commission since they also were directed to the question of public need for the tunnel. One of these, Exhibit No. 16 for identification, consists of the entire transcript (10 volumes) of the hearings before the ICC in Finance Docket No. 21725. This Court has already passed upon the ICC decision in Finance Docket No. 21725 and upheld the conclusion that public convenience and necessity require continued operation through the tunnel. (*Northwestern Pacific Railroad Co. v. Interstate Commerce Commission, et al.*, October Term, 1964, No. 381, 379 U.S. 132; 13 L. ed 2d 333.)

Appellant NWP has had long experience before this Commission and in appeals from decisions of this Commis-

sion. Appelant is quite aware that the record in proceedings had before the California Commission are not brought up to the Supreme Court of California unless the petition for writ of review is granted. This is not to say that a litigant is foreclosed by such a procedure. As NWP also knows full well, it is free to attach as an appendix to a petition for writ of review addressed to the Supreme Court of California all or any part of the record made before the California Commission so as to assure its consideration by the California Court and its inclusion in the record on appeal in the event the petition for writ is denied.

CONCLUSION

The unusual fact situation here—obviously not contemplated by the abandonment sections of the Interstate Commerce Act despite their having been designed for the protection of the public—is being cynically used by the NWP and the SP so to perpetuate a diversion of traffic from a competitor. After four and one-half years of frustration and delay the public is entitled to a final resolution. The opinion of the Supreme Court of California should be affirmed.

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(Appendices Follow)

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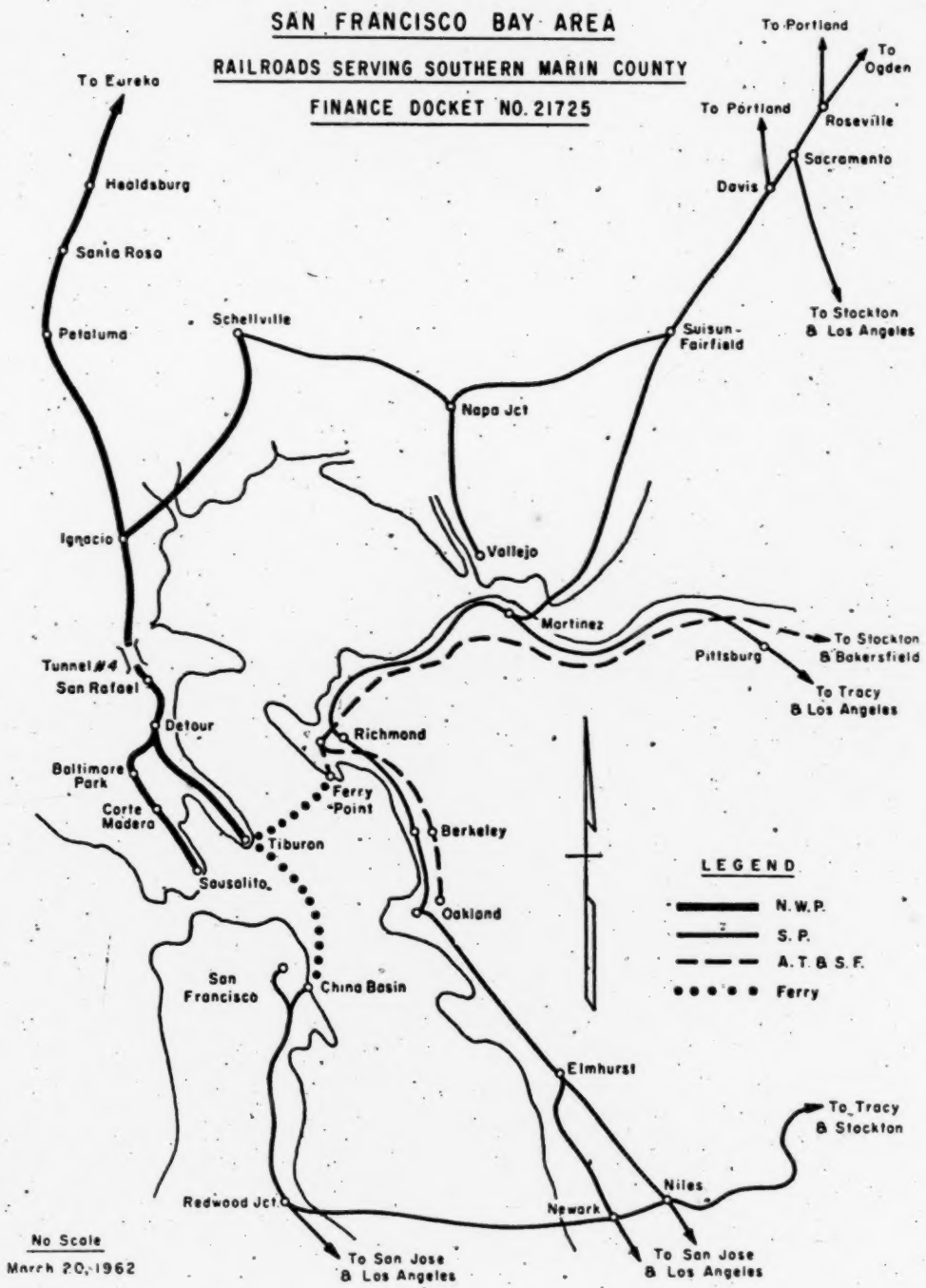
Appendix A


SAN FRANCISCO BAY AREA
RAILROADS SERVING SOUTHERN MARIN COUNTY
FINANCE DOCKET NO. 21725
To Eureka
Healdsburg
Santa Rosa
Petaluma
Schellville
Ignacio
Tunnel #4
San Rafael
Detour
Baltimore Park
Corte Madera
Tiburon
Sausalito
Napa Jct
Vallejo
Suisun-Fairfield
To Portland
To Ogden
To Portland
Roseville
Sacramento
Davis
To Stockton & Los Angeles
Martinez
Pittsburg
To Stockton & Bakersfield
To Tracy & Los Angeles
Richmond
Ferry Point
Berkeley
Oakland
San Francisco
China Basin
Elmhurst
To Tracy & Stockton
Niles
Newark
Redwood Jct.
To San Jose & Los Angeles
To San Jose & Los Angeles
LEGEND
N.W.P.
S.P.
A.T.&S.F.
Ferry
No Scale
March 20, 1962

Appendix B

Service Date
March 30, 1965

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 24th day of March, A. D. 1965.

Finance Docket No. 23249

NORTHWESTERN PACIFIC RAILROAD COMPANY ABANDONMENT IN MARIN AND SAN FRANCISCO COUNTIES, CALIF.

Upon consideration of the record in the above-entitled proceeding, and of petitions of the Public Utilities Commission of the State of California, The Atchison, Topeka and Santa Fe Railway Company, and of other protestants, representing several communities and shippers in the immediate area, for reconsideration of the Commission's order of December 10, 1964, denying their motions to dismiss the application of the Northwestern Pacific Railroad Company under sections 1(18)-(20) for authority to abandon (a) a portion of the Sausalito Branch, (b) a portion of the main line between San Rafael and Forbes Overhead, together with all sidings, spur tracks and appurtenances, and (c) alternatively, or in the event the Commission denies this application as to (b), to abandon a portion of the main line between Meadowsweet and San Francisco, involving 4.5 miles of main line railroad and 5 miles of ferry route, all in Marin and San Francisco Counties, Calif., as described more fully in the application; and

It appearing, That on appeal in *Northwestern Pacific R. Co. v. Interstate Commission* et al., U. S. , the United States Supreme Court by per curiam opinion of November 23, 1964, affirmed the judgment of the United States District Court for the Northern District of California, and subsequently denied petition for rehearing in the matter on January 18, 1965, thus sustaining the lower court's conclusion (228 F. Supp. 690) that there is substantial evidence to support the Commission's denial of the abandonment application in *Northwestern Pac. R. Co. Abandonment,* 320 I.C.C. 19, involving the Puerto Suello Tunnel; that similarly in *Northwestern Pac. R. Co. Abandonment,* 312 I.C.C. 783, authority to abandon said portion of the Sausalito Branch line, was denied by the Commission; that the Commission's findings of facts in these proceedings are conclusive; that by instant application filed August 10, 1964, applicant seeks authorization to abandon the same portions of its line, including the Puerto Suello Tunnel and Sausalito Branch segments, as were embraced in the previous applications, which have been denied; that the alternative authorization sought involves rail lines and areas of service which were an integral part of the matters fully considered in the said prior applications; that in the light of these circumstances the decrease in rail freight volume of several shippers on the branch line and the relocation of a few of the companies, upon which grounds consideration is urged, do not constitute substantial changed conditions of such scope and substance, nor has applicant presented any other material fact or argument, to warrant consideration of the abandonment application filed August 10, 1964:

It is ordered, That upon reconsideration, the order of December 10, 1964, be, and it is hereby, vacated and set aside; and

It is further ordered, That the said application be, and it is hereby, dismissed.

By the Commission, Division 3, acting as an Appellate Division.

BERTHA F. ARMES,
Acting Secretary.

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